TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 57

SCAIFE COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 23, 1941.

CERTIORARI GRANTED JUNE 2, 1941.

SUPREME COURT OF THE UNITED STATES

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1941.

—4947

[fol. a]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 7509

SCAIFE COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

[fol. 1] **Appendix to Brief for Petitioner**

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 94813

WM. B. SCAIFE AND SONS COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Petitioner: S. Leo Ruslander, Esq., Samuel Kaufman, Esq.

For Respondent: J. Harrison Miller, Esq., Orris Bennett, Esq.

DOCKET ENTRIES

1938

July 21. Petition received and filed. Taxpayer notified. (Fee paid.)

July 21. Copy of petition served on General Counsel.

Sept. 19. Answer filed by General Counsel.

Sept. 19. Request for Circuit hearing in Pittsburgh, Pa. filed by General Counsel.

Sept. 26. Notice issued placing proceeding on Pittsburgh, Pa. Calendar. Copy of answer and request served.

1939

Aug. 22. Hearing set Sept. 11, 1939, Pittsburgh, Pa.

Sept. 2. Motion for leave to file amended answer filed by General Counsel—Amendment to answer lodged.

Sept. 6. Copy of motion for leave to file amendment to answer served on taxpayer.

[fol. 2]

Sept. 15. Hearing had before Mr. Smith on merits. Submitted. Respondent moves to file amendment to answer—objection by petitioner, who made general denial of res adjudicata issue—motion granted. Motion to file amendment to answer and amendment to answer filed. Partial stipulation of facts, with 1 copy of Exhibit "B" attached, filed. Briefs due Nov. 1, 1939—no exchange of briefs.
Sept. 26. Transcript of hearing Sept. 15, 1939 filed.
Oct. 20. Brief filed by General Counsel.
Nov. 1. Brief filed by taxpayer.

1940

Feb. 6. Opinion rendered—Charles P. Smith, Division 5. Decision will be entered under Rule 50.
Mar. 8. Computation of deficiency filed by General Counsel.
Mar. 12. Hearing set March 27, 1940 on settlement.
Mar. 23. Consent to settlement filed by taxpayer.
Mar. 27. Decision entered—Charles P. Smith, Division 5.
June 20. Petition for review by U. S. Circuit Court of Appeals, Third Circuit, filed by taxpayer.
June 21. Proof of service of petition for review filed.
July 5. Designation of contents of record filed by taxpayer.
July 8. Proof of service filed.

[fol. 3] Before United States Board of Tax Appeals

Docket No. 94813

William B. Scaife and Sons Company, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Reporter's Minutes

Hearing at Pittsburgh, Pennsylvania, on the 15th day of September, 1939, at 9:35 A. M.

The above-entitled proceeding came on for hearing on this the 15th day of September, 1939, before the Honorable Charles P. Smith, Member of the United States Board of Tax Appeals, at Pittsburgh, Pennsylvania, pursuant to notice of hearing heretofore given; whereupon, the following proceedings were had and testimony heard, to-wit:

APPEARANCES:

Samuel Kaufman, Esq., (First National Bank Building, Pittsburgh, Pa.), appearing on behalf of Petitioner.

J. Harrison Miller and Orris Bennett, Esqs., (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent.

Proceedings

Mr. Kaufman: Both sides are ready.

The Clerk: Please state your appearances.

[fol. 4] Mr. Kaufman: Samuel Kaufman for Petitioner.

Mr. Miller: J. Harrison Miller and Orris Bennett, for Respondent.

Your Honor, we have in this case filed an application to file an amended answer and that amended answer has been lodged with the Board. If I understand right, final action as to whether or not the Respondent is entitled to file an amended answer has not been acted upon.

Mr. Kaufman: If your Honor please, Petitioner has no objection to the amendment provided the record shows that the issue therein raised is denied by the Petitioner.

The Member: Is denied by the petitioner?

Mr. Kaufman: By the Petitioner. It merely raises a question of res adjudicata. We think that there is no merit to the issue, and we also think that the Respondent could probably argue that as a matter of law without raising it in the pleadings.

The Member: With that understanding, the amendment to the answer is allowed.

STATEMENT OF CASE ON BEHALF OF PETITIONER BY MR. KAUFMAN

Mr. Kaufman: If your Honor please, this case involves just one issue, and that is the amount of the credit to be [fol. 5] allowed to the Petitioner for the purpose of the excess profits tax for the year 1936. It is one of the two

return cases. There have been other cases before the Board falling within that general class, but we believe strongly that this case is different from any other case which the Board has had to hear, and in this respect does not involve in the present case an offer by the Petitioner to amend a capital stock tax report.

The report originally filed at the end of July, 1936, was erroneously filed, after its erroneous preparation by the treasurer in ignoring instructions which he had theretofore received.

Just a little more than a month thereafter, when the error was brought to the attention of the other officers of the company, the treasurer, who prepared and signed the original report, prepared this second report showing the value which had been agreed upon by the officers of the corporation prior to the filing of the first report. We propose to prove all these things so that it is our contention that the second report lodged with the Collector was the only report of the corporation, the first one having been prepared in error and without regard to the determination which had been arrived at by the officers of the corporation. They had never determined to file a report showing a declared value of $600,000. They had always determined that the declared value should be $1,000,000, and, therefore, the credit should be allowed on the basis of the higher value.

The record will show that the Collector accepted only the tax based on a $600,000 declared value, and that the Petitioner tendered the additional $400, based on the higher value, which the Collector refused to accept, and the record will also show that the petitioner always has been and still is ready and willing to pay the additional tax of $400.

[fol. 6] STATEMENT OF CASE ON BEHALF OF RESPONDENT BY MR. MILLER

Mr. Miller: Your Honor, the Respondent takes the position that the capital stock tax return filed by the Petitioner on July 29, 1936, for the fiscal year ended June 30, 1936, was their capital stock tax return. The value of $600,000 stated therein was their declared value and that, under the provisions of 105-F of the Revenue Act of 1935, the Petitioner did not have a right to file an amended return declaring another value.

It is also the position of the Respondent that the Petitioner is estopped now to claim that he is entitled to the use

of a value other than this $600,000 inasmuch as that question has been litigated in the courts, in the District Court of the Western District of Pennsylvania, reviewed by the Circuit Court of Appeals, and the Supreme Court of the United States, and denied certiorari.

By Mr. Kaufman:

Mr. Kaufman: Just a word in answer to the new issue raised by the Respondent. It depends upon the doctrine of res adjudicata. That action, the Board should bear in mind, was between different parties than are involved in this proceeding. That was an action in equity by this Petitioner against the Collector of Internal Revenue seeking equitable relief in connection with the filing of the capital stock tax return. There was not involved in that case any question of liability for excess profits tax such as is involved in the present proceedings between the Petitioner and the Commissioner of Internal Revenue, so that, with that distinction [fol. 7] in mind, I think the authorities will show that the doctrine of Res Adjudicata does not apply, being a different issue, different parties.

The Member: I should say you were correct.

Mr. Kaufman: Thank you.

We have a stipulation covering most of the record facts, which is now submitted to the Board in duplicate, with this understanding, that this stipulation was rewritten late yesterday, and I have not yet had an opportunity to check the changes, so that it is submitted subject to check, subject to check by both parties.

The Member: With that understanding, the stipulation of facts is received in evidence.

Mr. Kaufman: There is submitted, as Exhibit B, which is referred to in the stipulation of facts, a copy of the record in the United States Circuit Court of Appeals in the action between this Petitioner and the Collector of Internal Revenue referred to in the opening statement and stipulation.

The Member: That will be received and filed with the stipulation.

Mr. Kaufman: Before we proceed with the oral testimony, I would suggest that your Honor read just the one page, being Exhibit A, attached to the stipulation. It is the letter to which I referred which the former treasurer wrote with the second return.

[fol. 8] EVIDENCE ON BEHALF OF PETITIONER

Thereupon the Petitioner, to maintain the averments of its Petition, introduced the following proof:

Testimony of Mr. Archie Vernon Murray

MR. ARCHIE VERNON MURRAY called as a witness by and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name.

The Witness: Archie Vernon Murray.

Direct examination.

By Mr. Kaufman:

Q. What is your occupation, Mr. Murray?

A. I am secretary and treasurer of the William B. Scaife and Sons Company.

Q. By profession, you are a certified public accountant?

A. I am.

Q. When did you become treasurer of William B. Scaife and Sons, which is the Petitioner in this case?

A. On June 1st, 1937.

Q. Were you employed by the company in the summer of 1936?

A. I was, from January 1st, 1936, until the present.

Q. In July and September, 1936, you were not an officer of the company?

A. I was not.

Q. Your predecessor in office was Mr. Frey?

[fol. 9] A. Yes; Mr. Mitchell Frey.

Q. Will you state whether or not you were present at the discussion had between Mr. A. M. Scaife and Mr. Frey prior to July, 1936, with reference to a capital stock report for the Petitioner?

A. I was not present at that discussion.

Q. You were not present?

A. I was not present.

Q. Mr. A. M. Scaife is vice president of the company?

A. Yes.

Q. Will you state whether or not you know about his leaving the country during the summer of 1936?

A. Mr. Scaife left the country for a European trip in the latter part of June, 1936, and returned in the early part of September, to the best of my knowledge.

Q. Had you, in your capacity as an employee of the company, received any instructions from Mr. Scaife with reference to the capital stock report before his departure?

A. Before his departure, we had discussed the valuations which — were to make for that year.

Q. Whom do you mean by "we had discussed"?

A. Mr. Scaife and myself.

Q. Yes, sir.

A. And at that time felt that a million dollars was a proper valuation.

Q. Did Mr. Scaife at that time determine that that should be the declared value?

Mr. Miller: I object, your Honor. The excess profits return filed for that period should speak for itself.

The Member: Objection overruled.

[fol. 10] Mr. Kaufman: You may answer, please.

The Member: Read the question, please.

(Thereupon the last question was read by the reporter as recorded.)

A. His reaction was that the million dollars should be the declared value.

The Member: When you say "reaction" what do you mean?

The Witness: He believed that it should be—the million dollars should be the declared value.

The Member: Why do you say he believed that?

The Witness: Only taking his——

By Mr. Kaufman:

Q. What did he say, Mr. Murray? I think that is what the Board would like to know.

A. After discussing the matter with me, he said that he believed that a million dollars was the proper value to return, based on the facts that we had.

Q. Did you have anything to do with the preparation of this return, Mr. Murray?

A. I did not.

Q. Did you know that a return was required to be filed in July of 1936?

A. Yes.

Q. When did you first learn about the fact that the return had been filed in the amount of $600,000?

[fol. 11] A. In about September 1st, or, I beg your pardon, on September 3, when we were posting the books for the month of July.

Q. Will you explain how that came to your attention at that time?

A. Well, I was engaged at that time to install a new pay roll, cost and store system. The posting of the books was considerably behind. We made the change-over in the system as of August 1st, and it was not until September 3rd that we were prepared to post the general ledger for the month of July, at which time I noticed that the entry for Federal capital stock for 1936 indicated a payment of $600, at which time I immediately questioned it, knowing that our previous discussion, or my previous discussion with Mr. Scaife was to the effect that the return was to be made on the basis of a million dollars.

Q. What did you then do, Mr. Murray?

A. I brought it immediately to the attention of Mr. Scaife and Mr. Frey.

Q. And that resulted in the filing of this so-called second return on or about that same day?

A. Yes, sir.

Q. Do you know Mr. Frey's present physical and mental condition, Mr. Murray?

A. I can answer only from personal observation. Mr. Frey has been under the care of a physician since a few months after his retirement.

Q. When was that?

A. He retired, left active service, about the middle of July, 1937.

Q. Would you state, based upon your observation, what his condition is?

A. Such that he hasn't full control of his faculties, either physical or mental.

[fol. 12] Q. Did you recently interview him for the purpose of determining whether to bring him to court in connection with this case?

A. On Tuesday of this week.

Q. Based on that interview, you decided not to bring him?

A. For his own good, I felt it would not be good to bring him here, since he has been in bed nine of the last eighteen months.

Q. How old is the gentlemen, or approximately how old?

A. Mr. Frey is over 65.

Q. What would you say as to his conduct in the summer of 1936?

A. That he was showing the effects of some illness at that time.

Mr. Kaufman: Cross-examine.

Mr. Miller: I do not wish to cross-examine at this time, but I would like for the witness to stay through the proceeding. We may want to call him later.

Witness excused.

Testimony of Allen Magee Scaife

Allen Magee Scaife, called as a witness by and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name.

The Witness: Allen Magee Scaife.

[fol. 13] Direct examination.

By Mr. Kaufman:

Q. Mr. Scaife, you are the vice-president of the Petitioner?

A. I am.

Q. You were in 1936?

A. I was.

Q. And were the matters of tax returns under your supervision at that time?

A. They were.

Q. Do you recall the circumstances with reference to the Federal capital stock tax report of 1936 before you went to Europe in June of that year?

A. Yes, I do.

Q. Will you state briefly what those circumstances were?

A. After a discussion with Mr. Murray, I deemed it advisable to instruct Mr. Mitchell Frey, who was then treasurer of our company, to make a return showing a stated valuation of $1,000,000. Previously we had discussed the advisability of submitting, making a lower return. The figure at that time that we had under discussion was $600,-

000. In view of the increased prospects of the company for earnings during 1936, it seemed very advisable to raise the limit to a stated value of $1,000,000.

Q. Did you so instruct Mr. Frey at that time?

A. I instructed Mr. Frey to that effect.

Q. And he agreed that that was a proper value——

A. Yes.

Q. —at that time?

A. Yes.

Q. Then, when did you leave this country in the summer of 1936?

[fol. 14] A. I left, I think it was the 26th or 27th of June.

Q. Then you returned late in August or early in September?

A. I returned—I landed in New York the latter part of August, and came to Pittsburgh the early part of September.

Q. Then, as Mr. Murray testified, he called this matter to your attention on or about September 3rd?

A. That is correct.

Q. Then what did you do?

A. I discussed the matter with Mr. Frey. Mr. Frey recalled the conversation, admitted having made an error, and wrote a letter, which he showed me, and which he submitted with the so-called amended return, the date of which was September 3.

Q. And he told you that he had forgotten about your instructions?

A. Yes.

Q. I believe the first return in the amount of $600,000 was signed in your absence by your brother, James Verner Scaife, president of the company?

A. That is right.

Q. In the course of his duties, does he give personal attention to matters of taxation?

A. At that time, he did not.

Mr. Miller: Then, I would like to object to that on the ground that the president of the corporation signed this return, and it seems to me that in his official capacity, the Court should take judicial notice, that he must have known what was in the return when he signed it.

Mr. Kaufman: We propose to show that he signed merely [fol. 15] as a matter of routine. He didn't take any part in the matters of discussion.

The Member: The objection is overruled.

Mr. Kaufman: Will you read the question and answer, please?

(Thereupon the last question and answer were read by the reporter as recorded.)

Mr. Kaufman: I think that is a fair answer to the question. Cross-examine.

Mr. Miller: I would like to have this document submitted for identification.

Mr. Kaufman: May I see it just a moment?

The Clerk: Marked for identification Respondent's Exhibit A.

Mr. Kaufman: That is already in the record.

Mr. Miller: I want to ask some questions about it.

Mr. Kaufman: All right.

Cross-examination.

By Mr. Miller:

Q. Can you tell me by whom that return was signed?

A. That is signed by my brother, the president of the [fol. 16] company at that time, and Mr. Frey, who was the treasurer of the company.

Q. Do you recognize that as the capital stock tax return of William B. Scaife and Sons, filed with the Collector under date of July 29, 1936?

Mr. Kaufman: That, your Honor, is objected to, as not proper cross examination of this witness. He didn't sign it, didn't make it. He testified he was not here when it was made. I doubt if he ever saw it before.

The Member: Objection overruled.

A. I don't recall ever having seen this before.

By Mr. Miller:

Q. You don't recall that, then, as the capital stock tax return filed under date of July 29, 1936?

The Member: Is there any question between counsel that that was the return filed?

Mr. Kaufman: No, your Honor. A copy of that is part of the stipulation.

The Member: But you wish to put in the original?

Mr. Miller: I think, your Honor, I would like to put the original in evidence.

Mr. Kaufman: The stipulation states that the exhibits attached to the printed record are true and correct copies [fol. 17] of the exhibits, and that is one of them. I don't know that there is any serious objection except that it is repetition in the record.

Mr. Miller: I would like to offer this in evidence.

The Member: Without objection, it is received as Respondent's Exhibit A.

(The 1936 Capital Stock Tax Return, so offered and received in evidence, was marked Respondent's Exhibit A, and made a part of this record.)

By Mr. Miller:

Q. You say you went to Europe the latter part of June, 1936, and returned early in September?

A. Yes.

Q. What time did you return in September?

A. I landed in New York the 27th of August, I believe, and came to Pittsburgh a few days later.

Q. How did you learn that the capital stock tax return declared a value of $600,000?

A. Mr. Murray telephoned me, and, as I recall the conversation, he said, "Do you recall our agreement to submit capital stock tax return on the stated value of a million dollars?" I said, "I do." He said, "Did you know Mr. Frey made the return on the basis of $600,000?" I said, "I had not known that." I said, "That was directly contrary to my instructions to Mr. Frey before my departure." And then I got Mr. Frey on the telephone, and discussed the matter with him, and I asked him why he had done it, and he admitted that it was an error.

Q. By "error" do you mean that he forgot the instructions?

[fol. 18] A. It was an error for him not to follow my instructions at the time I discussed the matter with him previously.

Q. Is V. P. Scaife your brother?

A. J. V. Scaife.

Q. What is his capacity?

A. He is president of William B. Scaife and Sons Company.

Q. Is he active?
A. Yes.
Q. Is he acquainted with the affairs of the corporation?
A. Yes.
Q. Did he sign the capital stock tax return?
A. He did.
Q. And did he swear to the return as being true and correct?
A. I assume so.
Q. Where is he at the present time?

Mr. Kaufman: He is right here, Mr. Miller. We are going to call him.

By Mr. Miller:

Q. Where is Mr. Frey?
A. Mr. Frey is at his residence. I don't know the address. It is in the East End.

Mr. Miller: That is all.
Mr. Kaufman: That is all.

Witness excused.

[fol. 19] Testimony of James Verner Scaife

James Verner Scaife, called as a witness by and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:
The Clerk: State your name, please.
The Witness: James Verner Scaife.

Direct examination.

By Mr. Kaufman:

Q. You are the president of the Petitioner?
A. Yes, sir.
Q. And you were president in 1936?
A. Yes, sir.
Q. Who was president of the company before you, Mr. Scaife?
A. My brother, Mr. A. M. Scaife.
Q. Your brother, who testified here?
A. Yes, sir.

Q. Who was president before him?
A. My father.
Q. When your father was living, he looked after matters of taxation?
A. Yes, sir, entirely.
Q. Then, when your brother became president, did he inherit that work?
A. Yes, sir, he did.
Q. In 1936 you were not paying any attention to matters of taxation?
A. No, sir, I was not.
Q. When you signed this return, which is marked Re-[fol. 20] spondent's Exhibit A, in July of 1936, did you examine it?
A. I don't believe I did, sir. I took it more as a routine, perfunctory duty. I was under the impression that my brother, before he left for Europe, had instructed Mr. Frey exactly what to do.
Q. Did Mr. Frey prepare this return?
A. Yes, sir, he did.
Q. Did he hand it to you for your signature?
A. Yes, sir, he did.

Mr. Kaufman: Cross examine.

Cross-examination.

By Mr. Miller:

Q. You signed the capital stock tax return?
A. Yes, sir, I did.
Q. You didn't enter any objection to it?
A. No, sir, I did not.
Q. You swore to the return?
A. I didn't hear you, sir.
Q. You swore to the return?
A. Yes, sir.
Q. As being a correct return?
A. Yes, sir.

Mr. Miller: I would like to have this identified as Respondent's Exhibit.
The Clerk: Marked for identification Respondent's Exhibit B.
[fol. 21] Mr. Miller: Would your Honor care to look at the capital stock return that we have been talking about?

Mr. Kaufman: Counsel for Respondent would request that we stipulate for the record that in the corporation income and excess profits return of the Petitioner for the calendar year, 1936, filed March 15, 1937, executed by J. V. Scaife, Jr., President, and M. M. Frey, Treasurer, also executed by M. M. Frey and Archie V. Murray, the persons who prepared the return. In the excess profits tax computation the value of the capital stock, as declared in the capital stock tax return for the year ended June 30, 1936, is stated to be $600,000.

Mr. Miller: No further questions.

Witness excused.

Mr. Kaufman: I should like to recall Mr. Murray for one or two questions.

Archie V. Murray—Recalled

Archie V. Murray, a witness previously called by and on behalf of the Petitioner, was recalled, and having been heretofore duly sworn, was further examiner and testified as follows:

Direct examination.

By Mr. Kaufman:

Q. Mr. Murray, you have heard the stipulation just read into the record about the 1936 income and excess profits tax——

[fol. 22] A. Yes, sir.

Q. —which is signed by you and Mr. Frey as the persons who prepared it, and you heard it stipulated that the declared value was there shown at $600,000?

A. Yes.

Q. Will you explain why you prepared the return on that basis?

A. During the preparation of the return and in view of the suit that had been brought in connection with the 1936 capital stock tax return.

Q. Oh, you mean that that suit was already pending at that time. Well, by reference to the record of the case, I see it was started November 24, 1936.

A. There was some question as to the value to be shown. Upon advice of our then accountants, Main and Company, I filed it at $600,000 or showed it as $600,000 on the income tax return.

Q. By "some question", do you mean that you wanted to show it at $1,000,000?

A. Definitely.

Q. And you were advised that pending the outcome of that suit, it should be stated in the other amount?

A. Yes, sir.

Mr. Kaufman: Cross examine.

Mr. Miller: No cross examination.

Witness excused.

Mr. Kaufman: That is our case, if your Honor please. No further questions.

[fol. 22] Mr. Miller: Respondent rests.

COLLOQUY

The Member: Counsel will desire to file briefs, I assume.

Mr. Kaufman: Unless your Honor is willing to disallow the deficiency without them.

The Member: What is the statute that prevents the filing of amended capital stock tax returns?

Mr. Miller: Does your Honor want to see it, or do you want it read into the record?

The Member: Just note it for the record.

Mr. Miller: Section 105-F of the Revenue Act of 1935.

The Member: What is the sentence that the Respondent is relying upon?

Mr. Miller: "For the first year ending June 30, in respect of which a tax is imposed by this section upon any corporation, the adjusted, declared value shall be the value as declared by the corporation in its first return under this section (which declaration of value cannot be amended) as of the close of its last income taxable year ending at or prior to the close of the year for which the tax is imposed by this section."

[fol. 24] The Member: That is the sentence I had in mind. The Board, of course, has had occasion to consider that language in a number of decisions, and I certainly don't want to pass upon this case until I have had a chance to look up those other opinions of the Board and what the

Courts have done also but I would like to ask counsel for the Petitioner how he can get around that language. As I understand it, there was the first return that was filed. Apparently it was properly executed. It is the contention of the Petitioner, I suppose that it was an error to put in the value at $600,000 instead of a million dollars. How can that original return be amended?

Mr. Kaufman: We contend that we are not amending the original return. We say that the original return did not reflect the considered judgment of the corporation, was not a return showing a declared value, that it must be ignored, and the second one be considered the original one. That is our position that under the facts here it must be concluded, as a matter of fact, that the return showing the million dollar value was the original return, that the million dollar value was the original declared value. The statute does not speak about amended returns. It speaks about declared values. It is our contention, therefore, that the value of a million dollars was the original declared value, that the amount erroneously shown on that return must be ignored on the facts.

The Member: I think I will decide this case against the Petitioner on the authority of two or three decisions filed [fol. 25] by the Board, but I will give each party an opportunity to file briefs but they will be without exchange.

Mr. Kaufman: How long, your Honor?

The Member: Until November 1st, that will be forty-five days, and they will be received without exchange.

(Hearing concluded.)

EXHIBIT "A"

Wm. B. Scaife & Sons Co.,

Pittsburgh, Pa.

September 3, 1936.

Collector of Internal Revenue, Federal Building, Pittsburgh, Pa.

DEAR SIR:

Attention is called to our Annual Capital Stock Tax Return for 1936. I am attaching in triplicate amended

Federal Capital Stock Tax Return which we request you accept in place of the one originally filed.

The determination of the proper amount to be returned has always been made by our Vice-President, Mr. A. M. Scaife, who was in Europe at the time of the filing date. Through an error I overlooked following his instructions to make the return on the basis of $1,000,000.00 rather than the amount shown.

[fol. 26] While the President of the Company together with myself signed the return, the question of altering the amount shown in previous returns was not discussed.

I made an error in stating the amount which according to my instructions should be $1,000,000.00 instead of $600,000.00 and this error was not uncovered until today, otherwise, it would have been called to your attention.

Enclosed please find check for $400.00 to cover the additional tax liability for the amended report.

Yours truly, Wm. B. Scaife & Sons Co., M. M. Frey, Jr., Treasurer.

Before United States Board of Tax Appeals, Washington

Docket No. 94813

Wm. B. Scaife & Sons Co., Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Decision

Pursuant to the Opinion of the Board promulgated February 6, 1940, the respondent herein having on March 8, 1940, filed a recomputation, and the petitioner having on March 23, 1940, filed an acquiescence therein, now therefore, it is

[fol. 27] Ordered and Decided: That there are deficiencies in income tax and excess profits tax for the taxable year 1936 in the respective amounts of $1,679.15 and $812.70.

Enter:

(Signed) C. P. Smith, Member.

Entered Mar. 27, 1940.

BEFORE UNITED STATES BOARD OF TAX APPEALS

OPINION

SMITH:

This proceeding involves an income tax deficiency for 1936 in the amount of $1,946.63 and an excess-profits tax deficiency for that year in the amount of $942.15. Petitioner alleges that the respondent erred (1) in adding to its income an overstatement of Pennsylvania capital stock tax in the amount of $1,919.97, and (2) in refusing to allow a declared capital stock value of $1,000,000 as a basis for computing its excess-profits tax.

The first issue has been settled by stipulation filed at the hearing, the parties having stipulated that petitioner is entitled to a deduction from gross income in the amount of $917.55, in addition to the amount of $2,294.25 previously allowed, and may be entitled to a further deduction in the amount of $229.42 depending upon the action taken on its petition to the Pennsylvania Board of Finance and Revenue.

As to the second issue the essential facts are as follows:

On July 29, 1936, there was filed on behalf of the petitioner a Federal capital stock tax return for the period ended June 30, 1936, in which the original declared value [fol. 28] of its capital stock was stated at $600,000. The return was prepared by the petitioner's treasurer and signed by petitioner's president, J. V. Scaife.

Early in September 1936, it came to the attention of petitioner's officers that in the preparation of the return the petitioner's treasurer had declared a capital stock valuation of $600,000, whereas he had been instructed by petitioner's vice-president, A. M. Scaife, to report a declared capital stock value of $1,000,000. Petitioner's president, who signed the return, did not examine it carefully and was not aware of the fact that the lower capital stock valuation of $600,000 had been declared. The petitioner's president, J. V. Scaife, and its vice-president, A. M. Scaife, were brothers.

On September 3, 1936, the petitioner lodged with the collector of internal revenue at Pittsburgh, Pennsylvania, its Federal capital stock tax return for the period ended June 30, 1936, in which the declared value of its capital stock was stated at $1,000,000 and tendered to the collector its

remittance in the amount of $400 to cover the additional Federal capital stock tax computed on that basis. The collector returned to the petitioner the $400 so tendered and refused to accept for filing the amended capital stock tax return, but did retain the return and transmit it to the Commissioner of Internal Revenue as a part of the record in the case.

On November 24, 1936, the petitioner instituted in the District Court of the United States for the Western District of Pennsylvania an action seeking to enjoin the collector of internal revenue at Pittsburgh from refusing to receive and accept the amended return and substitute it for [fol. 29] the original return previously filed. The petition was denied by the District Court, 18 Fed. Supp. 748, and the lower court's opinion was affirmed by the United States Circuit Court of Appeals for the Third Circuit, 94 Fed. (2d) 664.

Section 105 of the Revenue Act of 1935 provides in part as follows:

SEC. 105. CAPITAL STOCK TAX.

(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1.40 for each $1,000 of the adjusted declared value of its capital stock.

* * * * * * *

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. * * *

* * * * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by [fol. 30] the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). * * *

In Haggar Co. v. Helvering, — U. S. — (Jan. 2, 1940), the Supreme Court held that the declaration of capital stock value as contained in the first capital stock tax return filed by a taxpayer pursuant to section 215 of the National Industrial Recovery Act of 1933, 48 Stat. 195, 207, which was carried forward into the subsequent revenue acts, may be amended within the time fixed for filing such return. The Board and some of the lower courts previously had taken the view that the statute permitted no amendment to the declaration of value contained in the first return properly filed by the taxpayer. See William A. Webster Co., 37 B. T. A. 800; Haggar Co., 38 B. T. A. 141; affd., 104 Fed. (2d) 24; A. J. Crowhurst & Sons, Inc., 38 B. T. A. 1072; Blake & Kendall Co v. Commissioner, 104 Fed. (2d) 679; Chicago Telephone Supply Co. v. United States, 23 Fed. Supp. 471; certiorari denied, 305 U. S. 628. The Haggar Co. case sustains Glenn v. Oertel Co., 97 Fed. (2d) 495, and Philadelphia Brewing Co. v. United States, 27 Fed. Supp. 583, where the opposite view was taken.

There is a factual difference between the instant case and the Haggar Co. case which we believe to be vital. There, the amended capital stock tax return containing the new declaration of value was offered within the statutory time [fol. 31] for filing such return, as extended by Treasury Decisions 4368 and 4386, whereas in the instant case the amended return was not submitted to the Commissioner until after the expiration of the due date.

Under section 105 (a) and (d), above, the time for filing the capital stock tax return for the petitioner's taxable year ended June 30, 1936, expired on July 31, 1936. So far as the stipulated facts disclose, or as we are able to determine from an examination of the Treasury decisions and

rulings, no extension of the time for filing such return was granted either by general extension, as in the Haggar Co. case, or by specific grant to this petitioner. Apparently no extension of time for filing was asked and no amendment of the return which it had already filed was suggested by the petitioner until September 3, 1936, more than a month after the expiration of the filing period.

Throughout its opinion in the Haggar Co. case the Court emphasized that the amended return there was offered within the time for filing of the return for that taxable year. We quote from the opinion:

In August, 1933, petitioner, a Texas corporation, mistakenly believing that it was required to state the par value of its issued capital stock in its tax return, filed a *timely return* for the year ending June 30, 1933, * * * The date for filing returns for that year having been extended to September 29, 1933, T. D. 4368, 4386, petitioner *before that date* filed an amended return. * * *

* * * The Circuit Court of Appeals for the Fifth Circuit affirmed, holding that § 215(f) by its terms precluded any amendment of the tax return for the first year even though made *within the time allowed* for filing the return. 104 F. (2d) 24. * * *

[fol. 32] The Commissioner founds his argument in support of the decision below upon a literal reading of the introductory sentence of § 215 (f) already quoted, which, he argues, precludes even a *timely amendment* of the tax return for the first year, and upon the administrative and Congressional interpretation of the statute. He insists that the phrase "first return" in the clause "declared value shall be the value as declared by the corporation in its first return under this section (which declaration of value cannot be amended)," means the first paper filed by the taxpayer as a return, and that these words plainly forbid any amendment of the declared value of the capital stock, even though made *within the time allowed* for filing the return.

* * * * * * *

"First return" thus means a return for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes, and includes a *timely amended return* for that year. A *timely amended return* is as much a "first return" for the purpose of fixing the

capital stock value in contradistinction to returns for subsequent years, as is a single return filed by the taxpayer for the first tax year. Glenn v. Oertel Co., supra; Philadelphia Brewing Company v. United States, supra; see also, similarly construing the phrase "first return" under § 114 (b) (4) of the Revenue Act of 1934, 48 Stat. 680, 710; C. H. Mead Coal Co. v. Commissioner, 106 F. (2d) 388, 390; cf. Pacific National Co. v. Welch, 304 U. S. 191, 194. Thus read the statute gives full effect to its obvious purposes and to the evident meaning of its words. To construe "first return" as meaning the first paper filed as a return, as dis- [fol. 33] tinguished from the paper containing a *timely amendment*, which, when filed is commonly known as the return for the year for which it is filed, is to defeat the purposes of the statute by dissociating the phrase from its context and from the legislative purpose in violation of the most elementary principles of statutory construction. [Italics supplied.]

As we read the Court's opinion it goes no farther than to say that an amended capital stock tax first taxable year return containing a revised capital stock valuation may be filed within the time lawfully prescribed for filing such return. Without such a limitation on the time for filing an amended return the purpose of the statute to have a definite and fixed declaration of value "for the first taxable year," as was recognized by the court, would be defeated, since the taxpayer might in any subsequent year submit an amended return declaring a different value.

In the circumstances here disclosed the refusal of the Commissioner to accept the amended return offered by the petitioner after expiration of the period for filing the return for the taxable year was not an abuse of his discretionary powers. Cf. Morrow, Becker & Ewing, Inc. v. Commissioner, 57 Fed. (2d) 1. The law under which the original return was filed was not a "new law," as in the cited case, and the petitioner had had ample notice of its rights and obligations under the statute.

Petitioner's contention is that the understatement of the value of its capital stock as disclosed in its original return was due to the error of its officers who prepared and signed the return. However that may be, the mistakes of its officers do not relieve the petitioner of the consequences of its failure [fol. 34] to comply with the law. See Pioneer Automobile

Service Co., 36 B. T. A. 213; George S. Groves, 38 B. T. A. 727.

The petitioner, having timely filed its capital stock tax return for the year ended June 30, 1936, and the period for filing such return for that year having expired on July 31, 1936, we are of the opinion that petitioner was not entitled to file an amended return changing the declaration of value contained in the original return.

Reviewed by the Board.

Decision will be entered under Rule 50.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1940

No. 7509

Wm. B. Scaife and Sons Company, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

And afterwards, to wit, the 8th day of November, 1940, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 31st day of January, 1941, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1940

No. 7509

Wm. B. Scaife and Sons Company, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Petition to Review Decision of the United States Board of Tax Appeals

Opinion

(Filed January 31, 1941)

Before Biggs, Maris and Goodrich, Circuit Judges

Biggs, Circuit Judge:

In June, 1936 the petitioner's vice president in charge of tax matters, instructed its treasurer to make its capital

stock tax return as required by Section 105 of the Revenue Act of 1935, c. 829, 49 Stat. 1017, and to place upon its stock a value of $1,000,000. On July 29, 1936 the treasurer filed the return and by mistake placed a value of $600,000 upon the stock. When this error was discovered, a correct return was prepared declaring the value of the stock to be $1,000,000, and on September 3, 1936, which was after the time prescribed by the statute, an attempt was made to file this corrected return with the Collector of Internal Revenue who refused it.

The petitioner contends that the declaration attempted to be filed with the Collector upon September 3, 1936 was timely; that this was its true return which must serve as the basis for computing the excess profits tax imposed by Section 106 of the Revenue Act of 1935, 49 Stat. 1019.

The Supreme Court considered the nature of a similar return, one prescribed by Section 215 of the National Industrial Recovery Act of 1933, 48 Stat. 195, 207, in the case of Haggar Co. v. Helvering, 308 U. S. 389. Mr. Justice Stone stated that the purpose of that statute was twofold: first, to allow the taxpayer itself to fix the base for the capital stock tax; second, to guard the revenue against loss by providing for an increase in the excess profits tax prescribed by Section 216 of the National Industrial Recovery Act in case of understatement as to the value of its capital stock by a taxpayer. In the cited case, the taxpayer had returned the value of its capital stock as $120,000, but within the time fixed for filing a return as extended by the Commissioner had attempted to file an amended return fixing the value of its stock at $250,000. The Commissioner refused to accept the amended tax return and assessed a deficiency. The Supreme Court held (p. 395) that the "first return" referred to in the statute meant the return "for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes, and includes a timely amended return for that year." Mr. Justice Stone went on to say, "A timely amended return is as much a 'first return' for the purpose of fixing the capital stock value in contradistinction to returns for subsequent years, as is a single return filed by the taxpayer for the first tax year." Since the manifest purpose of the statute was served, the Supreme Court permitted the timely amendment of the Haggar Company to be filed and to stand as its capital stock tax return.

In the case of J. E. Riley Investment Company v. Commissioner, —— U. S. ——, the question of the timeliness of a return asserting statutory percentage depletion was before the Supreme Court. The statute involved was Section 114(b)(4) of the Revenue Act of 1934, 48 Stat. 680, and in construing it the Supreme Court held that a gold mining company which was unaware of the existence of the depletion allowance provision provided by Section 23(m), and for this reason did not assert percentage depletion in its first return could not be permitted to file an amended return over a year later in which it elected to take percentage depletion. The Supreme Court held that the later return was not a "first return" within the meaning of Section 114(b)(4), for that section requires the depletion allowance elected in the first return to be applicable not only for the taxable year for which the return was filed, but also for all subsequent taxable years. Referring to Haggar Company v. Helvering, Mr. Justice Douglas stated that the decision in that case "* * * would compel the conclusion that had the amended return been filed within the period allowed for filing the original return, it would have been a 'first return' within the meaning of Section 114(b)(4). But we can find no statutory support for the view that an amendment making the election provided for in that section may be filed as of right after the expiration of the statutory period for filing the original return." Mr. Justice Douglas went on to say that the opportunity to choose the method of depreciation "* * * was afforded as a matter of legislative grace; the election [none the less] had to be made in the manner and in the time prescribed by Congress. The offer was liberal. But the method of its acceptance was restricted. The offer permitted an election only in an original return or in a timely amendment. An amendment for the purposes of Section 114(b)(4) would be timely only if filed within the period provided by the statute for filing the original return. No other time limitation would have statutory sanction. To extend the time beyond the limits prescribed in the Act is a legislative not a judicial function."

In the Riley Investment Company case the Supreme Court points out that it is not dealing with an amendment intended merely to correct errors or miscalculations of an original return and refers to Article 43-2 of Treasury Regulations 86 which allows amendments to permit a taxpayer

in a later taxable year to take advantage of a loss incurred in a prior taxable year. This might imply the possible conclusion that if the amendment sought to be filed by the Riley Investment Company had been designed merely to correct an error or miscalculation made in stating depletion percentage in the original return such an amendment would have been permitted. But Section 114(b)(4) of the Revenue Act of 1934 does not contain language in anywise similar to that contained in subsection (f) of Section 105 of the Revenue Act of 1935 which expressly provides that the declaration of value made in the first return cannot be amended.

We conclude therefore that the "first return" required by 105(f) is that return, original or amended, made for the first year in which the taxpayer exercises its privilege of fixing the value of its capital stock tax when filed within the time and only within the time prescribed by the statute. It follows that the petitioner's attempted amendment was not timely and therefore cannot serve as the return required by the statute.

Accordingly the decision of the Board of Tax Appeals is affirmed.

A true Copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1940

No. 7509

WM. B. SCAIFE AND SONS COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decision of the

said Board of Tax Appeals in this cause be, and the same is hereby affirmed.

Philadelphia, January 31, 1941.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Affirming Decision of B. T. A. Received & Filed Jan. 31, 1941. Wm. P. Rowland, Clerk.

In the United States Circuit Court of Appeals for the Third Circuit

No. 7509

Wm. B. Scaife and Sons Company, Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Motion for Substitution of Name of Petitioner

The petitioner, representing to the Court that its name was changed effective January 1, 1941 from Wm. B. Scaife and Sons Company to Scaife Company by Articles of Amendment to its Articles of Incorporation (a certified copy whereof is submitted herewith), respectfully moves that its amended name, Scaife Company, be substituted in lieu of its former name, Wm. B. Scaife and Sons Company, in the title of this case.

Samuel Kaufman, Ruslander and Kaufman First National Bank Bldg., Pittsburgh, Pennsylvania, Counsel for Petitioner.

Filed April 10, 1941. Wm. P. Rowland, Clerk.

In the United States Circuit Court of Appeals for the Third Circuit

No. 7509

Wm. B. Scaife and Sons Company, Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Coram: Biggs and Maris, Circuit Judges:

Upon consideration of the motion by counsel for petitioner this day filed,

It is Ordered that the name of petitioner in the above entitled cause be, and the same is hereby changed from Wm. B. Scaife and Sons Company to Scaife Company.

For the Court, John Biggs, Jr., Circuit Judge.

April 15, 1941.

Filed April 15, 1941. Wm. P. Rowland, Clerk.

United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Petitioner, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of Wm. B. Scaife and Sons Company, petitioner, vs. Commissioner of Internal Revenue, respondent, No. 7509, the caption of the case now being changed to Scaife Company, petitioner, vs. Commissioner of Internal Revenue, respondent, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 16th day of April in the year of our Lord one thousand nine hundred and forty-one, and of the Independence of the United States the one hundred and sixty-fifth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 44] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 2, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 45,330. U. S. Circuit Court of Appeals, Third Circuit. Term No. 57. Scaife Company, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed April 23, 1941. Term No. 57, O. T., 1941.